

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JODI SCHULZ,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security

Defendant.

CASE NO. C18-96 BAT

ORDER REVERSING AND REMANDING FOR FURTHER PROCEEDINGS

Plaintiff, Jodi Schulz, appeals the ALJ's decision finding her not disabled. The ALJ post-traumatic stress disorder, panic disorder with agoraphobia, attention deficit disorder, cytic dependence, iatrogenic opioid dependence, history of alcohol abuse, back impairment associated with low back pain and history of headaches without clear etiology, history of scabies, current dermatitis are severe impairments; the impairments do not meet the Listings; ff retains the RFC to perform less than the full range of light work subject to additional al, environmental, and mental limitations; and plaintiff is not disabled because she can m past relevant work, and other jobs in the national economy. Tr. 19-28. The ALJ's on is the Commissioner's final decision. Tr. 1.

Plaintiff contends the ALJ (1) improperly relied upon substance abuse to reject medical and testimonial evidence; (2) improperly rejected her testimony, the lay testimony, and the

1 opinions of Carl Epp, Ph.D., Phyllis Sanchez, Ph.D., Marnie Levinson, M.A.; and (3) erred at
2 step three by failing to properly evaluate dermatitis. The Court **REVERSES** the Commissioner's
3 final decision and **REMANDS** the matter for further proceedings under sentence four of 42
4 U.S.C. § 405(g).

5 **DISCUSSION**

6 **A. The ALJ Harmfully Erred at Step Three**

7 The ALJ found recurrent dermatitis is a severe impairment but failed to mention the
8 impairment at step three. Tr. 20. Citing to *Gonzalez v. Sullivan*, 914 F.2d 1197, 1200-01 (9th Cir.
9 1990), the Commissioner argues this failure is of no moment because an ALJ need not state why
10 a claimant fails to satisfy every different section of the listing of impairments. Dkt, 11 at 8. The
11 argument fails. First, the decision itself acknowledges, at step three, the ALJ "must determine
12 whether the claimant's impairment or combination of impairment is of a severity to meet or
13 medically equal the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1."
14 Tr. 18. The ALJ failed to make this determination.

15 Second, *Gonzalez v. Sullivan*, does not support the Commissioner's argument. The
16 *Gonzalez* Court focused on whether the ALJ made sufficient findings upon which a "reviewing
17 court may know the basis for the decision." *Gonzalez* at 1200. The *Gonzalez* Court found the
18 ALJ's five page summary of the medical record and the ALJ's findings regarding the claimant's
19 complaints were sufficient, i.e., they provided an "adequate statement of the 'foundations on
20 which the ultimate factual conclusions are based.'" *Id.* But the *Gonzalez* Court did not hold the
21 ALJ may disregard a severe impairment, make no findings, and provide no discussion regarding
22 the impairment. But that is what the ALJ erroneously did here. *See also Santiago v. Barnhart*,
23 No. 278 F.Supp.2d 1049, 1058 (N.D. Cal. 2003) (Rejecting Commissioner's reliance on

1 *Gonzalez v. Sullivan*, and finding “the Court simply cannot determine from the ALJ’s opinion
2 how he came to the conclusion that Santiago’s “severe” impairments did not equal sections 1.03
3 and 1.13.”). Consistent with *Santiago* and *Gonzalez*, the Court concludes the ALJ harmfully
4 erred by failing to discuss recurrent dermatitis at step three, or at any subsequent step of the
5 sequential disability evaluation process.

6 The Commissioner suggests the ALJ’s failure to address recurrent dermatitis is harmless
7 because plaintiff does not meet the requirements of Listing 8.05 which governs dermatitis. Dkt.
8 11 at 8-9. Plaintiff contends otherwise arguing she meets the Listing’s requirements. Dkt. 10 at
9 16-18. These arguments require the court to weigh the evidence, and thus invites the court to
10 impermissibly play ALJ in the first instance. The court reviews the reasons the ALJ asserts in
11 support of her decision. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.2003). If the ALJ fails
12 to make findings regarding a severe impairment, the court cannot simply substitute its own
13 findings and conclusions. *Treichler v. Commissioner of Social Security*, 775 F.3d 1090, 1103
14 (9th Cir. 2014).

15 Additionally, remand is appropriate even if recurrent dermatitis does not meet the
16 Listings. In determining a claimant’s RFC, an ALJ must assess all the relevant evidence,
17 including medical reports and witnesses’ descriptions of limitation, to determine what capacity
18 the claimant has for work. See 20 C.F.R. § 416.945(a). That did not occur here. Hence if the ALJ
19 on remand finds dermatitis does not meet the Listings, the ALJ must nonetheless continue with
20 the five step disability process and determine what impact the severe impairment has on
21 plaintiff’s RFC. In sum, the ALJ harmfully erred by failing to mention or discuss recurrent
22 dermatitis, a severe impairment, at step three or at any subsequent step of the disability
23 evaluation process.

1 **B. The ALJ’s Assessment of Medical and Other Source Opinions**

2 **1. *Carl Epp, Ph.D.***

3 The ALJ rejected Dr. Epp’s opinion that plaintiff is markedly and severely limited in her
4 ability to understand, remember, complete a normal work day, and persist. Tr. 24. The ALJ
5 rejected Dr. Epp’s opinion on the ground plaintiff “inaccurately reported her history of substance
6 abuse” to the doctor. *Id.* Substantial evidence does not support the ALJ’s reasoning. Dr. Epp
7 knew plaintiff’s statements about substance abuse did not stack up, noting the discrepancy
8 between plaintiff’s denial of substance abuse and her admission that she had used clonazepam
9 for 22 years. Tr. 321. The doctor thus recognized plaintiff was not accurately reporting her
10 substance use. Based on this discrepancy, the doctor indicated he could not make a complete
11 diagnoses and recommended further evaluation for drug addiction. *Id.* If anything, Dr. Epp’s
12 recommendation required the ALJ to further develop the record regarding the impact of
13 plaintiff’s drug addiction, not simply reject it.

14 The ALJ also discounted Dr. Epp’s opinion on the grounds it was “contradicted” by
15 plaintiff’s daily activities. Tr. 24. The Commissioner does not defend this conclusory reason. In
16 any event plaintiff’s activities—leaving her home and visiting a son; getting along with health
17 care providers, or buying groceries at a “familiar store” do not contradict Dr. Epps’ opinion.

18 **2. *Phyllis Sanchez, Ph.D.***

19 The ALJ rejected Dr. Sanchez’s opinion that plaintiff is markedly limited in her ability to
20 complete a normal workday, on the grounds the doctor was unaware of the extent of plaintiff’s
21 substance abuse. Tr. 24. In specific, the ALJ found Dr. Sanchez knew about plaintiff’s
22 benzodiazepine dependence but did not review plaintiff’s medical records, and was unaware
23 plaintiff also tested positive for methamphetamine and opiates. However, Dr. Sanchez stated

1 “there is some indication of polysubstance use, including sedatives and ETOH.” Tr. 633. The
2 doctor specifically noted plaintiff was taking daily doses of Hydrocodone, an opioid, and
3 Clonazepam, a benzodiazepine. *Id.* Dr. Sanchez further indicated all of plaintiff’s “symptoms can
4 be subsumed under the panic, benzo/cognitive deficit, and hydrocodone use category.” Tr. 636.
5 The record thus shows Dr. Sanchez recognized plaintiff used a variety of substances including
6 opioids and that substance use affected plaintiff’s functioning. Additionally, the ALJ did not find
7 plaintiff’s methamphetamine use caused limitations that were different than any limitation
8 caused by other substances plaintiff used. Accordingly substantial evidence does not support the
9 ALJ’s finding that the doctor was unaware of the extent of plaintiff’s substance use.

10 **3. *Marnie Levinson, M.A.***

11 The ALJ rejected Ms. Levinson’s opinions that plaintiff cannot maintain regular work
12 attendance, and has a number of other serious functional limitations. Tr. 25. The Commissioner
13 argues the ALJ gave two valid reasons to reject Ms. Levinson’s opinion. First Ms. Levinson is
14 not a medical source, i.e. a doctor. *Id.* Evidence from other sources is important and must be
15 evaluated by the ALJ. *See Garrison v. Colvin*, 759 F.3d 995, 1013–14 (9th Cir. 2014). The ALJ
16 thus cannot reject an opinion merely because it is rendered by an other medical source. Rather
17 the ALJ must give germane reasons for rejecting opinions from other sources. *Dodrill v. Shalala*,
18 12 F.3d 915, 919 (9th Cir. 1993). The ALJ accordingly erred as a matter of law in rejecting Ms.
19 Levinson’s opinions simply because she is an other medical source.

20 Second, the Commissioner argues “the ALJ found Ms. Levinson’s opinion was based
21 upon Plaintiff’s unreliable self-reports.” Dkt. 11 at 6. This is not a valid basis because as
22 discussed below, the ALJ erred in rejecting plaintiff’s testimony as to her mental limitations. The
23 Court also notes the argument overstates the ALJ’s findings. The ALJ found Ms. Levinson

1 opined plaintiff could not maintain regular attendance or be punctual for work based upon
2 "claimant's self-report." Tr. 25. But the ALJ did not make the same finding as to other
3 limitations Ms. Levinson assessed. Tr. 25.

4 **C. Lay Testimony**

5 Lay testimony as to a claimant's symptoms is competent evidence the ALJ must take into
6 account, unless the ALJ expressly determines to disregard such testimony and gives reasons
7 germane to each witness for doing so. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).
8 Additionally, the ALJ's reasons for disregarding lay witness testimony must be specific. *See*
9 *Stout v. Comm'r of Soc. Sec.*, 454 F.3d 1050, 1053 (9th Cir. 2006).

10 The ALJ rejected the testimony of plaintiff's step-parents Gordon Sherling and Alonna
11 Chatburn on the grounds they were unaware of plaintiff's substance abuse. Tr. 26. This is not a
12 germane reason. The finding implies substance use is a factor that would affect the witnesses'
13 testimony about plaintiff's functioning, i.e., if they knew about substance use, they would have
14 stated plaintiff is more functional. But the ALJ did not make specific findings regarding the
15 impact of substance use on plaintiff's functioning other than noting "substance abuse is not a
16 factor material to the determination of disability," and plaintiff's history of substance abuse does
17 not render her disabled. *Id.* Given these findings, there is no basis to conclude the step-parents
18 would have given different statements had they known about plaintiff's substance use. The Court
19 accordingly finds the ALJ erred in relying on the step-parents' knowledge of plaintiff's
20 substance abuse to discount their testimony.

21 The ALJ also failed to discuss a statement provided by SSI Facilitator Luke Christensen.
22 The Commissioner's counsel argues Mr. Christenson's observations are not significant. The
23 Court rejects the argument. The Court reviews the ALJ's findings, not counsel's post-hoc

1 arguments. As noted above, the ALJ is required to take into account lay testimony about a
2 claimant's symptoms. The ALJ failed to do so and accordingly harmfully erred.

3 **D. Plaintiff's Testimony**

4 Newly revised Social Security Ruling ("SSR") 16-3p, 2017 WL 5180304, at *13,
5 provides guidance on how adjudicators must evaluate a claimant's statements. SSR 16-3p is
6 applicable to the ALJ's decision issued July 29, 2016, as adjudicators must apply SSR 16-3p in
7 making decisions on or after March 28, 2016. 82 Fed. Reg. 49, 468. SSR 16-3p eliminates the
8 use of the term "credibility" and instead focuses on an evidence-based analysis of the
9 administrative record to determine whether the nature, intensity, frequency, or severity of an
10 individual's symptoms impact his or her ability to work. SSR 16-3p does not, however, alter the
11 standards by which courts will evaluate an ALJ's reasons for discounting a claimant's testimony.
12 To reject subjective complaints, an ALJ must provide "specific, cogent reasons" and, absent
13 affirmative evidence of malingering, must reject a claimant's testimony for "clear and
14 convincing" reasons. *Morgan v. Commissioner of SSA*, 169 F.3d 595, 599 (9th Cir. 1999); *see*
15 *Carmickle v. Commissioner, SSA*, 533 F.3d 1155, 1160 (9th Cir. 2008).¹

16 The ALJ rejected plaintiff's testimony for several reasons. First the ALJ focused on
17 plaintiff's daily activities. As to mental limitations, the ALJ found plaintiff's testimony about
18 difficulty leaving her house and missing family events was inconsistent with her testimony that
19 she saw her 16 year old son every other weekend. *Id.* These activities do not contradict one
20 another. Plaintiff testifies she is very close to her son hence her ability to see him only twice a
21 month is consistent with her testimony that she has a limited ability to leave her home. The ALJ

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23 ¹ In *Carmickle*, the Ninth Circuit rejected the proposition that there had to be a specific *finding* of
malingering; rather, it was sufficient that there be *affirmative evidence* suggesting malingering.
See Carmickle, 533 F.3d at 1160 n.1.

1 also noted plaintiff's ability to maintain a friendship with her former husband and lack of
2 problems getting along with her health care providers contradicts her testimony that she cannot
3 sustain concentration and persistence. There is nothing showing being friends with a former
4 spouse and being able to get along with health providers requires the concentration and
5 persistence required to perform gainful work. The ALJ's finding is not supported by substantial
6 evidence.

7 The ALJ also found plaintiff's claim that she suffers from panic attacks is contradicted by
8 her ability to spend time with one or two people; shop twice a month at a familiar store and ride
9 in a private plane flown by her daughter. The record shows plaintiff's panic attacks are triggered
10 by things such as the sores all over her body, and the pressure she feels when asked to do things
11 in a certain time, not the activities noted above. Tr. 48, 58. Substantial evidence thus does not
12 support the ALJ's finding.

13 The ALJ also noted inconsistencies between plaintiff's testimony about her physical
14 limitations and her activities. Tr. 23. The ALJ noted in July 2014, plaintiff indicated she did all
15 the house and yard work, painted furniture, went outside most days, shopped for two hours at a
16 time, fixed things as a hobby, spent time with her children, did some exercises and walking, and
17 bought a new bicycle. *Id.* The ALJ concluded that taken as whole, these activities indicated that
18 plaintiff could perform light work, in contrast to plaintiff's testimony that she lacked the physical
19 ability to do any work. Plaintiff argues she was homeless at the time she made these statements
20 and did not perform much house or yard work Dkt. 10 at 10. Plaintiff acknowledges she did go
21 for walks but carried a stun gun because she was fearful of others. Plaintiff also argues it is
22 unclear to what extent she engaged in her hobbies and that she painted only a little bit. Plaintiff's
23 views about her activities are not unreasonable but neither are the ALJ's. The Court accordingly

1 is required to affirm the ALJ's assessment regarding plaintiff's testimony about her physical
2 limitations.

3 And finally, the ALJ rejected plaintiff's testimony based upon her poor insight into her
4 substance abuse, lack of candor in fully disclosing her substance use to medical sources, and her
5 inconsistent statements about whether she lived in a "drug house." Tr. 23. Plaintiff's lack of
6 insight and statements about where she lived do not contradict her symptom testimony. They
7 may reflect on her overall truthfulness or her character, but under SSR 16-3p, adjudicators may
8 not assess an individual's overall character or truthfulness in the manner typically used during
9 an adversarial court litigation. The ALJ accordingly erred in relying on this ground to reject
10 plaintiff's testimony. In sum the ALJ erred in rejecting plaintiff's testimony about her mental
11 problems but gave a valid reason to discount her testimony as to her physical limitations.

12 CONCLUSION

13 The Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter
14 for further proceedings under sentence four of 42 U.S.C § 405(g). The Court has the discretion to
15 remand for benefits or further proceedings. Further proceedings would be useful because the
16 record requires further development. Accordingly, the Court finds remand for further
17 proceedings is appropriate.

18 On remand, the ALJ shall reassess recurrent dermatitis at step three. If the ALJ
19 determines dermatitis does not meet the Listings, the ALJ shall proceed with the remaining steps
20 of the five step disability evaluation process and consider the impact the severe impairment has
21 on plaintiff's residual functional capacity. The ALJ shall reevaluate the opinions of Dr. Epps, Dr.
22 Sanchez, and Ms. Levinson and develop the medical record as needed. The ALJ shall reevaluate
23 the testimony of the lay witnesses and the testimony of plaintiff, excepting plaintiff's testimony

1 about her physical limitations. As discussed above, the ALJ provided a valid reason that is
2 supported by substantial evidence to discount plaintiff's testimony regarding her physical
3 limitations; the Court affirms the ALJ's determination in that regard. As appropriate, the ALJ
4 shall also reassess plaintiff's RFC and proceed to steps four and five.

5 Dated this 13th day of July, 2018.

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BRIAN A. TSUCHIDA
Chief United States Magistrate Judge